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Cases and Materials on Federal Government Contracts, by John W. Whelan and Robert S. Pasley

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Book Review

CASES AND MATERIALS ON FEDERAL GOVERNMENT CONTRACTS.
By John W. Whelan* and Robert S. Pasley.† Mineola, New York:
The Foundation Press, Inc., 1975. Pp. xlvii, 1247. \$23.50.

This book constitutes a most valuable addition to the teaching materials of law schools. No one will question the need of modern teaching materials for a course on government contracts, and the book here under review fills this need admirably. Of course, individual teachers may emphasize certain points and de-emphasize others. But there is so much material in the book, especially in chapter III ("The Making of Contracts; Regulations, Forms and Clauses; Contract Pricing"¹) and chapter V ("Contract Administration"²), that the teacher can make a proper choice of materials suitable for his own needs.

Chapter I³ contains a valuable glossary of terms typically used in the area of government contracts, a description of the various kinds of government contracts, and a description of the principal statutes and regulations involved. Most of the material in the chapter can be assigned for preliminary reading without class discussion, except part B.⁴ In that part the authors begin to discuss the limited application of traditional rules of private contract law to government contracts, e.g., estoppel and implied-in-law, third-party-beneficiary claims are generally unavailable. This essential difference between government and private contracts is prevalent in the entire area of government contracts. On pages 15-19, the authors set forth the fundamental case of *Federal Crop Insurance Corp. v. Merrill*,⁵ as showing the limited authority of government agents, while the related case of *G. L. Christian & Associates v. United States*,⁶ appears much later in the book.⁷ These famous cases eluci-

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1. J. WHELAN & R. PASLEY, CASES AND MATERIALS ON FEDERAL GOVERNMENT CONTRACTS 175-444 (1975) [hereinafter cited as WHELAN & PASLEY].

2. *Id.* at 501-810.

3. *Id.* at 1-106.

4. *Id.* at 15-79 ("Some Differences between Government and Private Contracts").

5. 332 U.S. 380 (1947).

6. 320 F.2d 345 (Ct. Cl. 1963).

7. WHELAN & PASLEY, ch. III at 398-408 ("The Making of Contracts; Regulations, Forms, and Clauses; Contract Pricing," Part B "Regulations, Forms and Clauses").

date points where private and government contract law diverge, and indicate that federal regulations may control terms omitted from government contracts. Accordingly, this reviewer prefers discussing them jointly. The different allocation of the two cases by the authors is mentioned here not as a point of criticism, but merely as a demonstration of the broad area the book covers and to what extent allocation of material in the area can differ.

In chapter II ("Expenditure of Public Funds on Contracts",⁸) attention is devoted to the technical concepts of the federal budget and the Office of Management and Budget, and the authors reach into many technical areas of constitutional law which, though highly important, usually are not covered in traditional constitutional law courses. Discussions are furnished of the constitutional ramifications of the congressional power of the "purse strings," of revenue and appropriation bills, and of the most important distinction between "authorization" and "appropriation" acts. The general topic of controls on expenditures (including the functions of the General Accounting Office) concludes the chapter.

As noted, chapter III ("The Making of Contracts; Regulations, Forms and Clauses; Contract Pricing") contains much material which is not readily available. One section provides extensive material on the sealed-bid method of formal advertising for contracts. For instance, the reader will find statutory provisions, regulatory statements, Comptroller General rulings, and court decisions (primarily of the Court of Claims) on matters such as who is a "responsible bidder," what is a "responsive bid," what is the law when bids are late, when are bids considered withdrawn or modified, and what are mistakes in bids.⁹ A similar section on negotiated contracts¹⁰ is principally devoted to the formalities imposed by Comptroller General rulings. The authors emphasize that competition is a very real factor in negotiated contracts.¹¹ The last section, dealing with the concepts of offer and acceptance in negotiated contracts,¹² concludes with a note the authors call the "McShain Saga."¹³ The "saga," a lengthy proceeding involving a Comptroller General's ruling and various court opinions, shows an unusual role reversal: The Government unsuccessfully argued that a process of negotiations had resulted in a contract, while a private company, which claimed that these deliberations were only "preliminary negotiations," prevailed.

8. *Id.* at 108-74.

9. *See id.* at 182-308.

10. *Id.* at 308-91 ("Contracting by Negotiation").

11. *See id.* at 310-20.

12. *Id.* at 372-91.

13. *Id.* at 381-91.

While chapter IV¹⁴ deals with the more readily available law on the rights of subcontractors, chapter V ("Contract Administration"),¹⁵ again, contains voluminous, interesting material which cannot be obtained so easily. Material is furnished on the burdensome concept of "Specifications";¹⁶ and an extensive part, devoted to the troublesome problem of "Changes and Modifications,"¹⁷ is broken down into five sections, one called by the authors "'Cardinal' Changes," and another "'Constructive' Changes." Strangely enough, in the entire part of "Changes and Modifications," the authors fail to mention specifically the celebrated Supreme Court decision of *United States v. Utah Construction & Mining Co.*¹⁸ That case expressly referred to the progressive specification of contract clauses such as those concerning "changes" or "changed conditions."¹⁹

Chapter V, part E ("Contracts as Public Policy Covenants")²⁰ discusses to what extent social and economic policies—such as the statutory and regulatory policy of favoring small business and of providing equal employment opportunity through nondiscrimination and affirmative action—are effectuated in government contracts. Two interesting tables of such social and economic programs supplement the discussion.²¹

Chapter VI ("The Government's Right to Terminate Contracts")²² contains valuable material broken down into a part dealing with Government termination for default and a part considering the Government's right to terminate for convenience. The part on termination for default commences with an interesting ruling of the Board of Contract Appeals of the Department of Defense (ASBCA)²³ which sustained a Government termination by converting a default termination into a termination for convenience. The part on termination for the convenience of the Government begins with a long authors' Note²⁴ showing that despite a clause allowing the Government to terminate for convenience, a government contract provides sufficient promissory consideration under general contract law.

14. *Id.* at 445-500.

15. *Id.* at 501-810.

16. *Id.* at 516-46.

17. *Id.* at 547-601.

18. 384 U.S. 394 (1966).

19. *Id.* at 417-18. The *Utah Construction* case is set forth by the authors later in Chapter IX on "Remedies," at 1128-39.

20. WHELAN & PASLEY at 646-762.

21. *Id.* at 658-63.

22. *Id.* at 811-99.

23. *Id.* at 827-34.

24. *Id.* at 880-85.

The Note also deals with the history of such clauses, covering matters such as World War I and World War II legislation.²⁵

Chapter VII ("State Power and Federal Action")²⁶ considers the impact of state and local regulation on contractors with the Federal Government. The chapter also deals with the important effect state or local taxation (or its nonapplication) may have upon the performance of the contract by the contractor, *e.g.*, the financial effect that state income, state sales, compensatory use, and property taxes may have.

Chapter VIII ("Disposal of Government Property"),²⁷ like the preceding chapter on the state regulatory and taxing powers, reaches into broader constitutional issues of allocation of powers in the Federal Government. Part B contains a substantial Note²⁸ describing federal statutes and regulations relating to property disposal.

Unfortunately, not all chapters of the book are of equal quality. In the concluding chapter (chapter IX—"Remedies of the Contractor and the United States") the authors fail to acquaint their readers with a House bill, introduced April 16, 1975, that could radically alter existing remedies.²⁹ For instance: (a) a decision of the government contracting officer could be immediately appealed to a court; (b) even if the party were to go first to the agency board of contract appeals, there would be a trial *de novo* in the court, any board decision having only the effect of a rebuttable presumption; and (c) there would be created a new agency called the Small Claims Board of Contract Appeals for claims up to \$25,000. Of course, it is a matter of speculation whether any part of the bill will ever be enacted, but it would have been nice if, at least in the preface (which was written in May 1975 and hypothesizes upon future changes in government contract law), the student had been put on notice that these significant changes may be enacted.

As to present law, the book sets forth the relevant Supreme Court opinions, some Court of Claims and circuit court of appeals decisions, and a few interesting Board of Contract Appeals rulings.

25. Surprisingly, the case of *G.L. Christian & Associates v. United States*, 320 F.2d 345 (Ct. Cl. 1963), though reproduced at length at another point in the book (at 398-408), is not mentioned in the part on the right to terminate for the convenience of the Government. That case, because of a regulatory requirement, read a standard clause for the termination of construction contracts for the convenience of the Government into a contract silent in that regard.

26. WHELAN & PASLEY 900-72.

27. *Id.* at 973-1017.

28. *Id.* at 980-85.

29. Bill to Provide for the Resolution of Claims and Disputes Relating to the Government Contracts Awarded by Executive Agencies, H.R. 6085, 94th Cong., 1st Sess. (1975).

Although the Wunderlich Act³⁰ is mentioned in certain Notes,³¹ there seems to be no mention in the book of the so-called Wunderlich Act Review provisions of the Rules of the United States Court of Claims,³² that set out specific procedures for judicial review of matters governed by dispute clauses in government contracts. The students should be told that a petition in the Court of Claims must set forth in detail the relationship of the Wunderlich Act to the specific items of relief sought.³³ Further, there should have been mention of the most unusual provision of Court of Claims rule 165(b). This rule, narrowing the Court of Claims review to an appellate tribunal review of administrative determinations, provides that the trial judge may *direct* either party by unreviewable order to file a motion for summary judgment.³⁴

With respect to counterclaims, the book contains certain dubious statements. In an aside, the authors state that the tort counterclaim issue "is difficult and is made *more complicated* by the 1966 Amendment to the Federal Tort Claims Act, Sec. 2, 80 Stat. 306, 28 U.S.C.A. § 2675, requiring submission of claims to the federal agency as a prerequisite to suit" (emphasis supplied), and a few cases are cited as shedding "some light."³⁵ The 1966 amendment, however, specifically provided that counterclaims are *not* covered by the requirement of prior submission to the federal agency.³⁶

In the last portion of the book,³⁷ the authors discuss a contractor's right to seek relief directly from Congress via a private bill and a congressional reference. The very last question in the book is "What should be the result if a counterclaim is presented by the U.S. to a congressionally referred claim?"³⁸ The authors refer the

30. 41 U.S.C. §§ 321-22 (1964). The Wunderlich Act was passed to override the decision in *United States v. Wunderlich*, 342 U.S. 98 (1951), on dispute clauses. Dispute clauses, standard in government contracts, provide that all factual disputes will be decided by the government contracting officer and that appeal from his decision is limited to an appeal to the head of the officer's department. In *United States v. Wunderlich*, *supra*, the Court held these decisions of government officers to be final absent fraud. The Wunderlich Act extends judicial review of these administrative decisions beyond fraud situations, provides the uniform review standard of bad faith, and has been interpreted to prohibit government contract clauses that make final a government officer's decision on questions of law.

31. WHELAN & PASLEY 1099-1100, 1114-15. See also the related Note, *id.* at 1162-64.

32. U.S. CT. CLAIMS R. 161-66, *reprinted in* 28 U.S.C. Appendix at 7904-05 (1970).

33. *Id.* R.162(a), *reprinted in* 28 U.S.C. Appendix at 7904 (1970).

34. *Id.* R. 165(b), *reprinted in* 28 U.S.C. Appendix at 7905 (1970).

35. WHELAN & PASLEY 1211.

36. 28 U.S.C. § 2675 (1966), *amending* 28 U.S.C. § 2675 (1948).

37. *Id.* at 1240-42 ("The Last Chance").

38. *Id.* at 1242.

student to *Meriden Industries Co. v. United States*.³⁹ That case, however, is not pertinent because it was an old (1958) congressional reference to the *court*, not a reference to the *commissioners* under the 1966 statute, and because it was decided under the Court of Claims' general jurisdiction over controversies. The new procedure is quite different. What the authors should have cited is General Order No. 3 of the Chief Commissioner which implemented 28 U.S.C. § 2509(b) and specifically laid down the rule for congressional references: "Counter-claims (Rules 40 and 102(d) and (e)) may have no application, but the rules are retained for the time being in order to determine the position of offsets."⁴⁰

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39. 386 F.2d 885 (Ct. Cl. 1967).

40. CHIEF COMMISSIONER, U.S. CT. CLAIMS, GENERAL ORDER NO. 3, PROCEDURE IN CONGRESSIONAL REFERENCE CASES (1969), reprinted in 28 U.S.C. Appendix, Appendix D at 7920 (1970).

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